

¹ This appointment was made due the retirement of Board Member Carol Foreman.

ISSUES

The ALJ found claimant to have a 10 percent functional whole body impairment as a result of her August 13, 2007 injuries and as of April 1, 2009, when her employment relationship terminated, was thereafter entitled to a 68 percent work disability (based upon a 100% wage loss and 36% task loss).

Respondent requests review of the ALJ's conclusion that claimant is entitled to a work disability under K.S.A. 44-510e(a). Respondent contends that claimant returned to work following her injury, earning as much or more as she had before her injury. And the only reason she has incurred a wage loss is because she voluntarily resigned her job with respondent and started her own business. Thus, because claimant suffered no wage loss in the year and a half after the injury she is not entitled to any work disability. Alternatively, respondent maintains that even after claimant established her new business, she has earned wages which resulted in, at most, a 32 percent wage loss. And when that figure is averaged with the 9.3 percent task loss opinion that takes into account the tasks claimant lost solely for this accident, the result is a 20.65 percent work disability.

Claimant argues that the ALJ's Award should be affirmed in all respects. Claimant points out that regardless of the task loss finding, her 100 percent wage loss (which is compelled by *Bergstrom*²) results in a maximum award. Thus, respondent's argument relating to task loss is academic. Moreover, the greater weight of the evidence supports the ALJ's finding that claimant's task loss is, at least 36 percent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The ALJ's Award sets out findings of fact and conclusions of law that are detailed, accurate and supported by the record. It is not necessary to repeat those findings and conclusions herein. Instead, the Board merely adopts the ALJ's findings and conclusions as its own as if specifically set forth herein except as hereinafter noted.

The sole issue to be determined in this appeal is claimant's entitlement to a permanent partial general (work) disability under K.S.A. 44-510e(a).

When an injury does not fit within the schedules of K.S.A. 44-510d, permanent partial general disability is determined by the formula set forth in K.S.A. 44-510e(a), which provides, in part:

² *Bergstrom v. Spears Manufacturing Company*, 289 Kan. 605, 214 P.3d 676 (2009).

Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. **The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.** In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. **An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.** (Emphasis added.)

There are, based on the plain language of this statute, two components to a work disability finding. First, is the wage loss and second, is the task loss. The wage loss component is critical and arguably the more important of the two because if claimant's post-injury wages do not meet or exceed the 90 percent threshold set forth above, no work disability is due. Here, respondent has taken issue with both components.

The wage loss portion of this calculation is based upon "the difference between the wages the worker was earning at the time of the injury and the wages the worker was earning after the injury."³ Respondent maintains claimant earned the same wages, and sometimes more, after her injury and is therefore not entitled to any work disability.

Judge Clark erroneously bases his 100% wage loss assessment on a "snapshot" of [c]laimant's wages at the time of Regular Hearing. The [r]espondent asserts that this is unwarranted by even a strict interpretation of the statute and that the [c]laimant had no wage loss based on the plain language of the statute . . .

It is unreasonable, and unwarranted by the law for Judge Clark to take the position that [c]laimant sustained a 100% wage loss when [c]laimant worked without

³ *Id.* at 610.

restrictions and with no lost time whatsoever from the date of accident until her voluntary resignation.⁴

In essence, respondent is arguing that claimant “created” her own wage loss and that such conduct should not be rewarded and that only those months, post-injury, when claimant earned a comparable wage should be considered for purposes of computing claimant’s wage loss under K.S.A. 44-510e(a).

Although there is some evidence within this record that supports an alternative explanation for claimant’s departure from her employment with respondent, there is no need to consider the reasons behind her wage loss. Our Appellate Courts have indicated that the strict interpretation of the statute makes no allowance for the reasons behind a claimant’s wage loss.⁵ Those reasons are, simply put, irrelevant. The case law compels the finder of fact to ascertain an injured claimant’s pre-injury average weekly wage, the post-injury average weekly wage and compare the two. The resulting percentage creates, or as the case may be, defeats, a claim for a work disability. If that percentage of wage loss is more than 10 percent, the injured claimant is entitled to a work disability.

And while respondent takes issue with the ALJ’s “snapshot” approach, the Board finds this approach to be entirely appropriate. Here, claimant returned to work and earned comparable wages following her injury. She was, therefore, not entitled to any work disability during that period of time. Indeed, she has not requested any permanency for that period beyond her functional impairment. When her employment was terminated as of April 1, 2009, then and only then was she eligible for a work disability. The finder of fact often has to deal with varying periods of time when, as here, an injured worker’s post-injury wages change.

Respondent also takes issue with claimant’s post-injury “wages”. Specifically, claimant established her own business and in doing so, loaned the business money. In the period of time leading up to the Regular Hearing, the record reveals that claimant received monies which were designated as “member draws” but which went to repay the loan she made. As of the Regular Hearing, claimant has had zero earnings from this job. The company has sufficient expenses, including start up costs, ongoing expenses, employees, such that there are insufficient profits for her to be paid. Only when the \$20,160.79 in loan proceeds is repaid will she begin to receive any salary from the company, and then only if there are sufficient profits. The record indicates that \$15,500 of the loan had been repaid to claimant. Thus, according to her accountant she had yet to see any monies that would be considered taxable income.

⁴ Respondent’s Brief at 4 (filed Jul. 12, 2010).

⁵ *Tyler v. Goodyear Tire & Rubber Co.*, 43 Kan. App. 2d 386, 224 P.3d 1197 (2010).

Respondent maintains that the \$15,500 claimant received should be considered income and would result in a 32 percent wage loss for the period from July 10, 2009 through December 31, 2009.⁶

The Board is unpersuaded by respondent's argument. It is clear from this record that claimant has yet to make any wages in her ongoing business. As of the time of the Regular Hearing, October 28, 2009, she had yet to receive any monies that would be considered income. Thus, under the *Bergstrom* rationale, claimant's wage loss is 100 percent as of April 9, 2009. The ALJ's Award is affirmed as to this issue.

Turning now to the task loss, respondent also takes issue with the ALJ's finding of 36 percent task loss.⁷ Respondent maintains the 36 percent task loss, which is an average of the two task loss opinions offered by Drs. Do and Flutter, are "not supported by the weight of the evidence."⁸ Respondent goes on to argue that only those tasks eliminated by the injury at issue in *this* claim should be considered and not those tasks that should have been eliminated by earlier injuries. And when appropriately done, the task loss should be 9.3 percent, as testified to by Dr. Do.

At the heart of this argument is the fact that claimant had Grade 1 spondylolisthesis before the accident which is at issue in this claim. And during the questioning of Dr. Do, he was asked to cull through the different tasks claimant *had been performing for the 15 year period* and indicate which were eliminated by the August 13, 2007 accident and those which she should not have been doing before the August 13, 2007. The net result was that "ten of the tasks were lost prior to August 2007, and that only three tasks were lost as a result of the injury sustained by the claimant in August 2007. This results in a 9.3% task loss."⁹

Like the ALJ, the Board is unpersuaded by respondent's argument as it relates to task loss. Claimant was performing the tasks outlined by the vocational specialist. The statute, K.S.A. 44-510e(a) specifically references the tasks the employee "performed". Respondent is asking the Board to read into the statute something that does not exist. Accordingly, the ALJ's finding as to task loss, which merely averaged the two task loss

⁶ It is unclear why respondent is using this arbitrary time period for purposes of computing a wage loss. The Regular hearing was held on October 28, 2009 and neither the ALJ, nor the Board has any other evidence beyond that bearing on claimant's wages.

⁷ The Board acknowledges that the 100 percent wage loss finding makes moot the finding on task loss as even a 1 percent task loss, when averaged with the 100 percent wage loss, yields a sufficiently high percentage of work disability which generates a maximum \$100,000 award.

⁸ Respondent's Brief at 7 (filed Jul. 12, 2010).

⁹ *Id.* at 8.

opinions which appropriately considered all of the tasks actually performed by claimant in the 15 years before her injury, is affirmed.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge John D. Clark dated May 20, 2010, is affirmed in its entirety although the calculation is modified to reflect the correct compensation rate for a date of accident of August 13, 2007.

The claimant is entitled to 41.50 weeks of permanent partial disability compensation at the rate of \$510.00 per week or \$21,165.00 for a 10 percent functional disability followed by permanent partial disability compensation at the rate of \$510.00 per week not to exceed \$100,000.00 for a 68 percent work disability.

As of December 29, 2010 there would be due and owing to the claimant 132.65 weeks of permanent partial disability compensation at the rate of \$510.00 per week in the sum of \$67,651.50 for a total due and owing of \$67,651.50, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of \$32,348.50 shall be paid at the rate of \$510.00 per week until fully paid or until further order from the Director.

The Board notes that the ALJ did not award claimant's counsel a fee for his services. The record contains a fee agreement between claimant and his attorney. K.S.A. 44-536(b) requires that the Director review such fee agreements and approve such contract and fees in accordance with that statute. Should claimant's counsel desire a fee be approved in this matter, he must submit his contract with claimant to the ALJ for approval.

IT IS SO ORDERED.

Dated this _____ day of December 2010.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Joseph Seiwert, Attorney for Claimant
 Bart E. Eisfelder, Attorney for Respondent and its Insurance Carrier
 John D. Clark, Administrative Law Judge